

November 2003

Cases of Note

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Recommended Citation

Strauch, Bruce (2003) "Cases of Note," *Against the Grain*: Vol. 15: Iss. 5, Article 20.

DOI: <https://doi.org/10.7771/2380-176X.4168>

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LEGAL ISSUES



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Cases of Note

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Copyright — VARA — In Which A Distraught Banner Artist Learns She's Not An Artist After All

Joanne Pollara v. Joseph J. Seymour and Thomas E. Casey, United States Court of Appeals for the Second Circuit, 2003 U.S. App. LEXIS 19646 (2003).

Pollara is an artist in Albany, New York who does painted banners for bar mitzvahs, corporate events and private parties. The **Gideon Coalition** hired her to do a banner for Lobbying Day. The banner was ten by thirty feet and placed as a backdrop for the **Gideon** table on **Empire State Plaza**, a state office area where bureaucrats mill about and presumably go outside to smoke.

Yes, the **Gideon** name comes from *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Pollara set to work with latex paint and heavy-gauge paper depicting "diverse" (naturally) folks lined up for Legal Aid at a shut door marked "Lawyer." The title exhorts folks to preserve the right to counsel by getting out there and fighting those draconian and heartless executive budget cuts.

The banner was taped to steel poles with a cross-bar and left unattended overnight. Along came **Thomas Casey**, a state bureaucrat who managed the **Plaza**. His supervisor had told him there was a banner there and to look into it. **Casey** liked an orderly **Plaza** and had the banner taken down. In the process it was torn into three pieces.

Alerted by phone call, **Pollara** rushed to the **Plaza** to find her work gone! She located it torn and forlorn in a corner of **Casey's** office. Outraged, she sued under the **Visual Artists Rights Act (VARA)**, 17 U.S.C. § 101 et seq. And she threw in 42 U.S.C. § 1983 for a violation of her First Amendment rights although that bit isn't even mentioned in the opinion.

The **VARA** claim had **Casey** and **Seymour**, his supervisor, acting willfully, wantonly, and/or with gross negligence in trashing her banner. **Seymour** got out on summary judgment because **Pollara** hadn't alleged any personal involvement on his part.

The district court held **Pollara** was not entitled to a jury trial because she was seeking only statutory damages which were equitable in nature. And she lost in the bench trial because the banner was not a "work of visual art" but rather advertising or promotional materials.

Appeal

Pollara said she was entitled to a jury trial because the Seventh Amendment of the Constitution guarantees a jury for suits at common law and traditional copyright violations fit under that. The Court said it was an open question whether that applied to **VARA** which doesn't relate to anything in the English Common Law.

Or anything in copyright law at all.

But they didn't have to get to that because they could deal with it on the basis of whether it was art at all.

So What Is This VARA Thing?

In 1990 **VARA** was made an amendment to the Copyright Act to protect the "moral rights" of artists. See *Carter v. Helmsley-Spear* ("Carter I") 861 F. Supp. 303, 313 (S.D.N.Y. 1994). It was designed to protect non-economic interests that the artist had in preserving a work in its created form even after sale or licensing.

If a mutilation, distortion or modification would prejudice an artist's reputation, then it shouldn't be done.

Yes, you've already spotted the nightmare problem of having to preserve those gigantic abstract sculptures that our urban centers purchased over the past thirty years to place in the middle of concrete deserts. One day the scales will fall from our eyes and we'll see that they're rubbish. And then what? A warehouse somewhere in Nevada for all of them?

VARA, however, only protects artists of "recognized stature" or whose "honor or reputation" is such that it would be prejudiced by a distortion, modification or whatever. And it only protects "visual arts."

It doesn't protect advertising ...

You can see that one. Billboards permanently frozen in time.

... or works for hire, whatever their artistic merit.

Yes, if you have an artist as a wage slave, you can tear his work up right in front of him as you fire him.

Anyhow, drawings and paintings are protected if not used in advertising. And as *Gegenhuber v. Hystopolis Productions, Inc.*, 1992 U.S. Dist. LEXIS 10156 (1992) tells us, it doesn't protect puppets or costumes or stage sets even though they weren't explicitly excluded under the Act.

Which sounds like the courts are not real pleased with this European Union moral rights stuff Congress imported over here and want to have to pronounce on the subject of art as seldom as possible. I could imagine a French court getting quite worked up over puppets and costumes and vowing to chastise all barbarians who dare to alter them.

Now What About the Banner?

Art vel non?

The banner was designed to draw attention to a lobbying effort. **Gideon** commissioned it and determined its content. While that isn't enough to make it a work for hire, this doesn't matter because **Gideon** didn't tear it up. It was advertising material which puts it outside **VARA**.

Pollara said it was special because it was for political advocacy and bore a political message. And that took it out of the commercial realm.

The Court said there was a whole world of public interest advertising out there including political advertising. And the word "promotional" is still broader in its sweep. Congress excluded promotion and advertising from the sweep of **VARA**.

Artsy But Not Recognized

The concurring opinion reached the same result as the majority but by finding that the work had never been exhibited and therefore was not of recognized stature.

"If a work has not been publicly displayed before its owner destroys it, how can the work be of 'recognized' stature?" **Jane C. Ginsburg**, Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990, 14 Colum.-VLA J.L. & Arts 477, 480 n.19 (1990).

continued on page 70



Cases of Note from page 68

This seems to ignore the fact that Pollara probably painted in a recognized style. In which case the question would be was she an artist of recognized stature and was this banner consis-

tent with her work. Yes, a Bar Mitzvah banner painter in Albany seems to answer that. This might make a nice Adam Sandler comedy.

The judge was concerned that "promotional material" should automatically shut a work out of VARA protection and cited for example a famous poster promoting the Olympics.

Copyright — Frivolous Appeals — In Which Rock Legend Joe Jones Learns that You Can Indeed Talk Too Much

Rosa Lee Hawkins; Barbara Anne Hawkins; Jon Marie Johnson v. Joe Jones dba Melder Publishing Company, United States Court of Appeals for the Fifth Circuit, 2003 U.S. App. LEXIS 18060 (2003).

*"My grandma' and your grandma'
sittin' by the fire
My grandma told your grandma'
I'm gonna set your flag on fire."*

Ah yes, jockamo fee nané. A classic of incomprehensible rock lyrics. **Two sisters and a cousin** out of the Callopie housing project in New Orleans make the big time.

Well, as they used to say, it's N'awlins if you're busted and Noo-Or-leeens if you're flush. And this trio won a talent contest and caught the eye of **Joe Jones** our Defendant-Appellant. **Jones** was likewise a singer with the 1960 hit "You Talk Too Much." The girls hired him as their manager and found themselves headed for the legendary **Brill Building** where Tin Pan Alley was giving rock 'n roll its dancing shoes.

"**Little Miss and the Muffets**" were made over into "**The Dixie Cups**," to record a **Phil Spector** song "Chapel of Love" for **Leiber** and **Stoller's Red Bird** label.

*"Today's the day (wah-hoo-ooo)
We'll say 'I do' (ooo-oooo)
And we'll never be lonely anymore."*

The 1964 hit soared to the top of the charts knocking the Beatles out of the Number 1 slot. It was the age of the great girl groups. Spector, the first rock mogul in history, had the Ronettes, and Red Bird would soon have the Shangri-las.

Yes. Who could forget "**Leader of the Pack**" and "**Remember (Walking in the Sand)**"?

And what could be a more Southern name for girls from New Orleans than the **Dixie Cups**? That paper cup and bottle of clean spring water was invented by **Hugh Moore** in 1900 as the "**Health Cup**" to replace public dippers and water troughs. It too was rebranded as the "**Dixie Cup**" and became a standard item on trains and in offices.

Fans of Southern-iana will recall **Tennessee Williams' Cat On a Hot Tin Roof** made into the immortal movie with **Liz Taylor** as Maggie the cat in heat. Her husband **Paul Newman** was suffering a promising young man burn-out complex under the bombast of **Big Daddy Burl Ives**. And, **Newman** had begun a failed pro-basketball team called, yes, **The Dixie Cups**.

Enough Digression, Already

Right. Back to our gripping rock saga. During a recording session break, our three Cups in

question began doing "Iko, Iko," a call and response chanting song that was in fact a "New Orleans standard" they had learned from their mother. **Leiber** and **Stoller** laid on bass and percussion to make it the fifth and last hit for the three girls.

Do I hear trivia buffs crying out for the other four? "Chapel of Love (1964)." "People Say" (1964). "You Should Have Seen the Way He Looked at Me" (1964). "Little Bell" (1965). Yes, it was a short little blazing comet of a career, but early rock 'n roll was like that. And then the Cups went the way of all has-beens which is to say appearances on **Dick Clark**, **Shindig**, **Hulabaloo** and then nothing — until they once again make the news as litigators.

The Cups recorded and registered copyright on "Iko, Iko," but of course it ended up owned by **Trio Music Publishing, Inc.** Curiously, **Trio** did not sew up the renewal term of the copyright, and it reverted to the Cups in 1992. Perhaps **Trio** saw the song as having a short shelf life — which was true — and did not foresee **Oldies Stations** and **Musak**.

Joe Jones, our Defendant-Appellant "exploited" the song in foreign climes, claimed authorship and paid the Cups zip. The Cups knew nothing of this until the song turned up, incredibly, in the year 2000 in **Mission Impossible II**.

Our case went to the jury in district court and the Cups won \$500 thou and the surrender of copyrights and licenses from **Jones' Melder Publishing**. **Jones** had counterclaimed for copyright infringement, but the Cups won judgment as a matter of law on that one under FED. R. CIV. P. 50(a).

The Appeal by Jones — Copyright

Jones claimed his company, **Melder**, was the first to register the song and that he renewed in 1991, but none of these registrations were entered into evidence at the trial. He also claimed the contradictory position that **Trio** registered and then granted to **Melder**. The evidence of that turned out to have been forged, but we'll get to that shortly.

His lawyer must have been a real doozy. Or else he had his face down in his hands in despair during the entire trial.

We're dealing with the 1909 Copyright Act here with its original term and renewal term. *Stewart v. Abend*, 495 U.S. 207 (1990).

U.S. Reports. Gosh, I miss those days of yore when you could order citations in your mind — just see where it was in the rows of books — with those nice hard covers validating it as THE LAW.

The old Act gave authors a **second shot at ownership**. If there was no writing expressly granting renewal rights then it reverted to the author. See 17 U.S.C. § 304(a)(1)(C). The Cups introduced the original 1964 copyright and the 1992 renewal. **Jones** introduced ... well, nothing. So he loses on that one.

Breach of Contract and Unfair Competition

Jones claimed to have a 1965 "songwriters' agreement" between **Trio** and **Jones** under which **Jones** got to exploit the song abroad. But if this were true, **Jones** of course would have been expected to pay **Trio** who would then have handed the Cups their cut. But **Jones** didn't do this.

Jones claimed to have a 1968 "settlement agreement" between **Trio**, the Cups and **Jones** in which the other two parties acknowledged that **Jones** owed them nothing. He had presented this to the Cups, but they had refused to sign it. Their signatures were on the document, but they said these were forgeries.

Jones had been sued before for falsely claiming authorship of songs and using forged documents as proof. See *Johnson v. Tuff N Rumble Management, Inc.*, 2000 U.S. Dist. LEXIS 8086 (E.D. La. May 15, 2000); *Davis v. Jones*, 1994 U.S. Dist. LEXIS 9995 (E.D. La. July 18, 1994); *Makedwde v.*

Johnson, 1994 U.S. Dist. LEXIS 63 (E.D. La. Jan. 5, 1994).

The jury had no trouble finding that **Jones** had forged a bunch of documents. The 1965 agreement which supposedly allowed him to exploit the song abroad was printed on a **laser printer**, had **justified text** and a **word processor file name**.

1965. I'll never forget that wretched high school term paper done with a manual typewriter and carbon paper. And the whole business in college of destitute grad student wives taking in typing to enrich their evenings.

Sanctions

Yes, this fits the definition of **frivolous appeal**. FED. R. APP. P. 38. **Jones** offered zero evidence at trial but the 1965 songwriters' agreement and the 1968 settlement agreement both of which were found to be forged. He should have cut his losses and slunk away.

But oh no, he had to appeal! And include in the appellate brief a medley of "baseless accusations of bias" on the part of the district court judge.

The Fifth Circuit sent the case back down to that biased district court judge to dubb in some bass and percussion of costs and attorneys' fees for **Jones** to pay along with his \$500,000. 

